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In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1946

No. 25

UNEMPLOYMENT COMPENSATION COMMISSION OF THE TERRITORY OF ALASKA, NOBLE DICK, R. E. HARDCASTLE and R. S. BRAGAW, as Members of, and constituting said Commission; and ALASKA PACKERS ASSOCIATION, a corporation, ALASKA SALMON COMPANY, a corporation, and RED SALMON CANNING COMPANY, a corporation,

Petitioners,

vs.

FRANK L. ARAGON and Other Applicants, Members of Alaska Cannery Workers Union Local No. 5, and ALASKA CANNERY WORKERS UNION LOCAL NO. 5 on Behalf of Applicants,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

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SUPPLEMENTAL BRIEF FOR PETITIONERS.

A. INTRODUCTION.

This case was argued before this Court on the 27th day of February, 1946, and ordered reargued in the October term. The purpose of this brief is threefold: first,

to comment on the fundamental principle of law involved in the light of *Social Security Board v. Nierotko*, 66 S. Ct. 637;[1] second, to amplify our discussion of the legislative history and construction in the light of the questions asked by the Court; third, to reply to certain parts of the Brief for Respondents not fully argued in Brief for Petitioners.

B. FUNDAMENTAL PRINCIPLE OF LAW.

We think it will clarify what follows if we here again state the fundamental principle of law upon which we rely. *In a proceeding in which the agency administering the statute must determine initially questions of specific application of broad statutory terms to particular facts the determination of such administrative agency is conclusive upon the reviewing court if the term under consideration has no unvarying legal significance and there is a rational basis for the administrative determination.*

Board v. Hearst Publications (1944), 322 U.S. 111, 130, 132;

Gray v. Powell (1941), 314 U.S. 402, 411-413;

Rochester Tel. Corp. v. U. S. (1939), 307 U.S. 125, 144-146;

South Chicago Co. v. Bassett (1940), 309 U.S. 251, 257-258;

Social Security Board v. Nierotko, supra;

United States v. Pierce Auto Freight Lines (1946), 90 L. Ed. (Advance Opinions) 629, 640-641.

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[1] This Court decided the *Nierotko* case February 25, 1946, two days before this case was argued and subsequent to the filing of petitioners' brief.

The most recent complete discussion of this principle is to be found in the *Nierotko* case. The problem there was whether this Court was bound to accept the decision of the Social Security Board that a "back pay" award by the National Labor Relations Board was not "wages" under the Social Security Act. This Court held that it was not so bound, saying (p. 643):

> "In the acts which were construed in the cases just cited [*National Labor Relations Board v. Hearst Publications* and *Gray v. Powell*], as in the Social Security Act, the administrators of those acts were given power to reach preliminary conclusions as to coverage in the application of the respective acts. • • •
>
> • • • Both N.L.R.B. v. Hearst Publications, page 131, of 322 U.S., page 860 of 64 S. Ct., 88 L. Ed. 1170, and Gray v. Powell, page 411 of 314 U.S., page 332 of 62 S. Ct., 86 L. Ed. 301, advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that 'back pay' awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well understood word—'wages'—to indicate

> the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.
>
> We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation."

Mr. Justice Frankfurter's concurring opinion said that "it is a plain disregard of the law for the Social Security Board not to include such payments among the employees' wages." The Act did not "give the Board judicially unreviewable authority to exclude from wages what as a matter of law are wages."

Unless, as respondents contend, the term "labor dispute" can mean only such disputes as are evidenced by strikes[2] and has such "well understood" meaning and is thus "beyond the permissible limits of administrative interpretation," the *Nierotko* principle has no application. Obviously, the term has no such commonly accepted meaning. As a matter of fact, if it has any commonly accepted meaning, it must be that defined in the Norris-LaGuardia Act, 29 U.S.C., sec. 113(c), and the National Labor Relations Act, 29 U.S.C., sec. 152(9). Congress in these recent years of social legislation has evidenced its under-

[2]Res. Br. p. 14.

standing of the term by a clear definition in both these acts. Nor does the *Nierotko* principle comfort respondents with respect to other terms of the Act under consideration upon which the Commission placed its interpretation. Deviation from *Gray v. Powell* is only permitted under the *Nierotko* case when the agency has interpreted a term contrary to the obvious intention of Congress. No such situation exists here, as we shall point out.[3]

This Court in *United States v. Pierce Auto Freight Lines*, supra, again held:

> "The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law" (pp. 640-641).

C. FUNDAMENTAL PURPOSE OF THE ACT.

1. LEGISLATIVE HISTORY.

A brief sketch of the history of the unemployment insurance law in the United States will show that a study and report was made to the President of the United States

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[3]See this brief, pp. 5-11 incl.

by the Committee on Economic Security in January, 1935, together with a draft bill for introduction in Congress.[4] The national act, then designated the Social Security Act,[5] became law on the 14th day of August, 1935.[6]

The national act does not provide benefits directly to the unemployed. It levies a tax and provides a framework under which states adopting approved state laws can participate in the funds so raised to defray their costs of administration. While Congress was considering the bill which subsequently became the Social Security Act, the Committee on Economic Security prepared drafts of model state unemployment compensation bills, which drafts with slight variations were subsequently adopted by each of the various states and territories until the broad framework was filled in and became complete. The Alaska Act substantially follows the model most universally adopted, and the problems which arise in this case are inherent in most, if not all, of the state acts.

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2. THE PURPOSES OF THE ACT.

The purposes of the Act were taken almost verbatim from the model bill and read as follows:

> "*Declaration of Territorial Public Policy.* As a guide to the interpretation and application of this act, the public policy of this Territory is declared to be as follows:

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[4]Excerpts from this report will be found in the Appendix on pages ii-iii.

[5]Title IX of that act, dealing with unemployment compensation, is now known as the Federal Unemployment Tax Act.

[6]Excerpts from the Senate Finance Committee Report will also be found in the Appendix on pages i-ii.

> Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this Territory. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this Territory, require the enactment of this measure, under the police power of the Territory, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own" (Alaska Statutes, chapter 4, Extraordinary Session Laws of 1937).

The Alaska Unemployment Compensation Commission found that the respondents were disqualified from benefits. On appeal the District Court of the United States for the Territory of Alaska upheld the Commission's determination and found that the men were not unemployed "through no fault of their own."[7] At the oral argument, Mr. Justice Black asked what facts supported this finding.[8]

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[7] R. 717.

[8] Questions are stated from memory of counsel, and while we believe the text contains the substantial purport of the questions, they are not quoted.

The entire factual situation supports this finding. The conceded facts—that the employers had work for the men to do, had employed them in previous years, had plants and equipment at and with which employment was available, and offered to employ them under the same conditions and at the same rates of pay as the Seattle employers offered to and did employ men for similar work during the 1940 season involved in this dispute—amply support the finding. The record clearly shows that the only reason respondents refused to go at the 1940 Seattle rate was their insistence that their rate be either the 1940 Seattle rate or the San Francisco rate for the 1939 season, whichever was the higher (R. 94-95, 115-117, 196-198). Regardless of the fairness of the 1940 Seattle rate, respondents were unwilling to take a possible reduction in wages as a matter of principle (R. 189). No contention was made that the 1940 Seattle rate was not adequate or compensatory, and, in fact, the union later accepted it. The refusal of the employees here involved to accept it was a choice voluntarily made by them over the employers' constant efforts to get them to accept employment. From every standpoint in the case there can be no question that there is sufficient evidence to justify the District Court in finding that the men were not unemployed through no fault of their own and the Commission in imposing the disqualification.

In determining the real purposes of the Act, we can look further than the declaration of territorial public policy to the origin of this legislation on a national scale. The basis of the national scheme for such insurance was the building of a fund through taxation. To accomplish

this the national Social Security Act was passed, with the method of distributing the fund to be set out in the model acts to be adopted by the states. The framers of this legislation had a well-defined purpose. They knew what they should and could do and what they should not and could not do as a practical matter. Never for one instant did they have in mind that all persons unemployed should receive insurance. They knew that any workable act would have to contain disqualifications for persons out of work because of a labor dispute. Otherwise, they envisioned the obvious practical difficulties with which the scheme would be faced. The necessity of including such disqualifications was always present in their thinking. We find it in the model state bills prepared by the Committee on Economic Security. The Committee undoubtedly had before it unemployment insurance systems adopted by England[9] and certain European countries, each of which contained disqualification provisions in the case of labor disputes. These laws, some of which have been in effect for years, indicate that the practical exigencies of human nature require such disqualification in order that the fund may be maintained and be available when needed for genuine, involuntary unemployment. As Mr. Justice Cardozo said in *Steward Machine Co. v. Davis*, 301 U. S. 548 (p. 586):

> "During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights."

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[9]Unemployment Insurance Act, 1920, sec. 8(1) (20 Chitty's Statutes, 6th Ed., 865, 872).

and

> "the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve."

In spite of all that has been done to improve and perfect the economic processes of our country, no one can say that cyclical depressions may not again occur, that unemployment may not follow in their wake and that the funds of this country now available for unemployment insurance will not be called upon to keep citizens from starving. If this be the scheme and purpose of the Act, as this Court held in the *Steward* case, then it is important for this Court to weigh heavily the expressed ideas of the framers of this social scheme and to give important consideration to the protective devices upon which they insisted for the maintenance of the fund.

Mr. Justice Black also asked if a man was offered employment at 50 cents an hour which he refused to accept because he could not live at that wage, was he disqualified under the Act as being unemployed through fault of his own. The Act provides for just such a contingency. Section 5 (c) of the Act provides for disqualification in the event the applicant fails without good cause to accept available, suitable work. The Act then carefully spells out a definition of these terms and includes specific provisions that the disqualification shall not apply

> "(A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (B) If the wages, hours, or other conditions of the work offered are substantially less favorable to

the individual than those prevailing for similar work in the locality;

(C) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

Thus, the natural apprehension which Mr. Justice Black had for an employee's welfare under the conditions he visualized is carefully worked out in the model act and included in the Alaska Act.

While the administrative function of the Alaska Commission obviously includes the application of these protective provisions to each case, the record amply shows that here we have no distortion of this function.[10]

Mr. Justice Reed asked whether the respondent individuals could have gone to work by signing up in Seattle. The employers would have permitted and in fact welcomed it. The only thing which would have prevented it was (a) the inability of the men to get to Seattle, and (b) the barrier placed in their way because of jurisdictional or other conflict with the Seattle local (R. 124-125), but they could, of course, have gone from San Francisco at the 1940 Seattle rate.

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3. THE TERM "LABOR DISPUTE."

Respondents' fundamental argument[11] for reversing the Commission and denying the application of the disqualification has always been based upon their insistence for a

[10] Supra, p. 8.

[11] Respondents describe it on page 19 of their brief as the "cardinal question."

narrow interpretation of the term "labor dispute." Before the Commission and the courts below, in their briefs and in the oral argument before this Court in February, counsel for respondents again and again have insisted that the term "labor dispute" be given a narrow, restricted meaning so as to liberalize the benefits conferred by the Act. They have argued that there was no labor dispute here, within the meaning of the Act, because the men were not actually working the job and did not actually strike the job.[12] It is contended that the definitions of "labor dispute" contained in the Norris-LaGuardia Act and the National Labor Relations Act do not apply—that this being remedial legislation primarily for the benefit of workmen, a much narrower and more restricted definition of "labor dispute" should be read into the Act so that these respondents receive their benefits without any disqualification.

This argument, as we pointed out in our opening brief, is without support in reason or authority; indeed, as respondents have unqualifiedly admitted at the oral argument, it is contrary to the rulings of every court in every state that has had occasion to consider it.

We wish to add here one new point that seems to us conclusive against respondents' contention, both from the standpoint of technical statutory construction and sound considerations of policy.

[12] Respondents describe their position as follows:

> "In other words, we think it is a fair construction of the Alaska Act to say that the term 'labor dispute' means a *strike* or the *leaving of employment* by workers pursuant to a dispute between their union and the employer over wages, conditions, representation, or some other clearly recognized employer-employee controversy" (Res. Br. p. 14 (Respondents' italics)).

The term "labor dispute" appears but once in the Social Security Act of 1935. In Section 903(a)(5) Congress carefully inserted a provision for the protection of the working man, imposing restrictions on the type of state law which the Social Security Board could approve. It provided that—

> "Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; • • •"

In no other place in the national act is "labor dispute" mentioned. Nor does it define "labor dispute." The national act followed by less than six weeks the National Labor Relations Act which did contain a broad and comprehensive definition of the term "labor dispute." Both of these laws were designed for the protection of workers. No serious contention can be made, we submit, that the term "labor dispute" was used in the Social Security Act in any different sense than it was used in the National Labor Relations Act. By the use of the words "strike, lockout, or *other* labor dispute" Congress certainly recognized, as it consistently has in other legislation, that the term "labor dispute" is broader than mere strike or lockout, and just as certainly it did not intend that individuals might be denied benefits if they refused jobs made available by a labor dispute such as that involved in the instant case.[13] We have pointed out that the Committee which drafted the Social Security Act was at the same

[13]Italics in this brief are ours unless otherwise noted.

time drafting the model bill subsequently adopted by the Alaska Legislature. Did the Committee intend that "labor dispute" in the Social Security Act means one thing and in the model act another? Did the Committee intend that "labor dispute" means one thing when referring to disqualification and another when requiring that benefits be given to unemployed persons if the only jobs available were due to a labor dispute? Respondents' argument for a narrow definition of the term may in the end work greater hardship on workingmen as a whole than if the true definition is held to be the proper one.

This question must be determined on the basis of the intention of the legislative bodies which enacted these laws. The term was obviously used in the same sense in which it was defined in the National Labor Relations Act. It is only in this sense that proper protection can be given to persons entitled to it under the provisions of the national act. To say that the term has some narrow and much restricted sense in the Alaska Act would, if applied uniformly throughout that Act, defeat the obvious protection which Congress insisted on giving those workers who refused to work on jobs available only because of a labor dispute.

There is a further important consideration. The Alaska Act cannot be construed abstractly, unrelated to the particular problems of that Territory. Climatically Alaska permits employment in its major industries only during limited seasons of the year. Historically many, if not substantially all, of these industries outfit in the United States, employ their labor here, and send expeditions annually to Alaska to operate during the permitted season.

The Alaska Unemployment Compensation Commission was faced with construing language contained in the Act in the light of the industrial realities in Alaska. While it is elementary that direct violence to the obvious meaning of the Act must be avoided, nevertheless slavish adherence to its exact terminology may produce an abortive result or even utter contradiction of its expressed purposes.[14] When terms used may mean one of two things, consideration must be given to the background and expressed purposes of the Act and the Commission must be upheld in choosing that meaning which furthers such purposes. Indeed, if it were necessary to go so far in sustaining the action of the Commission, it is quite clear that under the peculiar facts of this seasonal industry, the concerted refusal of the employees to *resume* the work they had left the preceding season was for all practical purposes a strike.

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4. THE MEANING OF THE PROVISION IN SECTION 5(d) "FOLLOWING THE BEGINNING OF SUCH DISPUTE."

Mr. Justice Douglas asked the time of the beginning of the 8 weeks' disqualification, in view of the provision "that such disqualification shall not exceed the 8 weeks immediately following the beginning of such dispute." The Commission found that the disqualification began at the beginning of the season for the "Canned Salmon Industry" in each of the three districts. The applicable part of the section provides:

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[14] As stated by this Court in *Utah Junk Company v. Porter* (1946), 90 L. Ed. (Advance Opinions) 796, 798, "All construction is the ascertainment of meaning. And literalness may strangle meaning."

"An individual shall be disqualified for benefits:

* * * * * * * *

(d) For any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed; provided, that such disqualification shall not exceed the 8 weeks immediately following the beginning of such dispute; * * *."

We respectfully submit that the language just quoted evidences an intent on the part of the Alaska Legislature that "the beginning of *such* dispute" obviously refers to the "labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed" during the period that the applicant's "total or partial unemployment is due" to such dispute.

Unless or rather until a labor dispute starts to be in active progress at the factory, establishment or other premises so as to create the unemployment for which the individual is entitled to benefits, except for the application of the disqualification provision, the limitation upon the disqualification period should not and does not commence to run. This logical and practical interpretation placed by the Alaska Unemployment Compensation Commission upon the language of section 5(d) accords with the intention of the Legislature. To argue that the disqualification period commences to run before employment could commence seems to us at least to be most unreasonable. We assume it also seemed unreasonable to respondents because this point was not urged here or in any court below or before the Commission.

Looking at the matter strictly from the viewpoint of the Legislature, one must conclude that the Legislature, while deeming benefits advisable, limited such benefits to persons unemployed because of a labor dispute so that a disqualification of 8 weeks must first expire before benefits would be payable. To go back to the beginning of the dispute in the sense of the date upon which the parties first began to discuss their labor contract would in most cases destroy the disqualification. In the normal case the employer and the union sit down and negotiate for days, weeks and often months before a climax is reached resulting in a work stoppage and consequent unemployment. Obviously the legislature could not have intended the commencement of the disqualification period to date back to the commencement of the various discussions. It is only if these words are interpreted to mean the beginning of the unemployment that they assume any practical or reasonable meaning.[15]

[15] In several states the Legislature, recognizing the ambiguity of this expression, has clarified it by using language to designate the commencement of the unemployment due to the labor dispute.

Section 592, New York Unemployment Insurance Law (C.C.H. Unemployment Insurance Service, New York, par. 4108);

Section 402, Pennsylvania Unemployment Compensation Law (C.C.H. Unemployment Insurance Service, Pennsylvania, par. 4102);

Section 7(4), Rhode Island Unemployment Compensation Act (5 C.C.H. Unemployment Insurance Service, Rhode Island, par. 4044);

Section 5(d), Tennessee Unemployment Compensation Law (6 C.C.H. Unemployment Insurance Service, Tennessee, pars. 4009-4013).

D. ANSWER TO RESPONDENTS' BRIEF.

1. THE REMEDIAL NATURE OF THE ACT.

The statute involved is remedial. Respondents claim:

> "The Act, being remedial in nature, is to be liberally construed and with a view toward awarding, rather than denying, benefits. Exemptions from the benefits of the Act must be strictly construed." (Res. Br. p. 5.)[16]

Respondents' text, as well as the authorities upon which they rely, clearly illustrates that the principle for which they contend has no application here. No question is here involved concerning "Exemptions from the benefits of the Act." We agree that

> "the framers of the act planned to extend the benefits of the legislation to as wide a class as could be comprehended within the meaning of the term employee, * * *."[17]

We also agree with respondents that "Exempt employment is strictly construed."[18] We certainly agree with Mr. Justice Murphy, who said in the *Phillips* case:

> "Any *exemption* from such humanitarian and remedial legislation must therefore be narrowly construed,

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[16]Respondents cite *Phillips Co. v. Walling*, 324 U.S. 490; *Steward Machine Co. v. Davis*, 301 U.S. 548; *Helvering v. Davis*, 301 U.S. 619; *Willard Sugar Co. v. Gentsch*, 59 F. Supp. 82; *Latimer v. United States*, 52 F. Supp. 228; *Cal. Emp. Com. v. L. A. Etc. News Corp.*, 24 Cal. (2d) 421, 150 P. (2d) 186. They also cite the unreported, unappealed-from decision of the Multnomah County, Oregon, Circuit Court in *Danzer v. UCC, et al.*, C.C.H. Unemployment Insurance Service, Oregon, par. 1980.001, where the court upset the commission's finding on the ground that the facts showed that the unemployment was not due to a labor dispute.

[17]Quoted from *Willard Sugar Co. v. Gentsch*, 59 F. Supp. 82, 84 (Res. Br. p. 9).

[18]Res. Br. p. 9.

giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an *exemption* to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people" (p. 493).

This rule has no application here. We are not dealing with exemptions or exclusions from the Act. Respondents are clearly entitled to the coverage of the Act and all the protection the Act affords, but they are not entitled to more money than the Act gives them or to greater benefits than the Act provides. There is no legal principle that legislation, remedial or otherwise, should be interpreted to give persons benefits contrary to the plain and sensible meaning of the statutory language.

Further, as above pointed out, the remedial feature of this statute is to accumulate funds and to award them as benefits to employees unemployed involuntarily because of depressions and other economic factors beyond their control. To construe the Act to award benefits in other situations so as to deplete the fund would destroy and not remedy the purpose sought to be achieved.[19] Therefore, if the Legislature clearly intended to limit benefits

[19] "The essential idea in unemployment compensation is the creation of reserves during periods of employment from which compensation is paid to workmen who lose their positions when employment slackens and who cannot find other work. Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed. • • • Payment of compensation is conditioned upon continued involuntary unemployment. Beneficiaries must accept suitable employment offered them or they lose their right to compensation" (Senate Finance Committee Report, Appendix p. i).

to certain persons under certain conditions or even to deny them benefits for limited periods, the intention of the Legislature as expressed in the Act is controlling. In such instances, it is the function of the adminstrative body to interpret the language used by the Legislature to carry out the legislative intent. Such bodies are trained for this purpose. The Court should not override this function unless clearly abused as a matter of law.

These principles have been uniformly followed by the state courts in applying disqualification provisions of social security legislation.

In re North River Logging Co. (1942), 15 Wash. (2d) 204, 130 P. (2d) 64;

Johnson v. Pratt (1942), 200 S.C. 315, 20 S.E. (2d) 865;

Bodinson Mfg. Co. v. California E. Com. (1941), 17 Cal. (2d) 321, 109 P. (2d) 935;

Matson Terminals, Inc. v. Cal. Emp. Com. (1944), 24 Cal. (2d) 695, 151 P. (2d) 202;

W. R. Grace & Co. v. Cal. Emp. Com. (1944), 24 Cal. (2d) 720, 151 P. (2d) 215.

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2. THE COMMISSION DID NOT ERR IN HOLDING THAT THE UNEMPLOYMENT WAS DUE TO A LABOR DISPUTE.

Respondents argue that the unemployment was not due to a labor dispute because (a) this was a seasonal industry and their unemployment ended at the close of the 1939 season, (b) their unemployment was due to the fact that the employers tried to force wage cuts and locked them

out, and (c) the former employees of the Alaska Salmon Company, as well as the employees of the Alaska Packers Association, were unemployed due to other causes.[20]

If, as petitioners contend, a "labor dispute" existed in this case, there is no merit to reasons (a) and (b). If the dispute prevented the employment at the commencement of the 1940 season, the disqualification applies regardless of the existence of employer-employee relationship. Further, under the law, the disqualification applies in the event of a dispute. We think the employers were entirely justified in insisting upon one over-all rate for all cannery workers that were leaving from San Francisco or Seattle. Nevertheless disqualification is not conditioned upon the fairness or unfairness of either party to the dispute.

Reason (c) resolves itself to this: The Alaska Salmon Company was apparently less well financed than the other two companies and could not afford to leave late and thus lose profit opportunity of a full season. Therefore, it determined earlier than the others that it would not go. Nevertheless it bargained in good faith with the union over a long period of time and made preparations for its trip until the continuance of the dispute caused it to decide not to go. The Commission properly concluded that it was the continuous labor dispute which prevented the Alaska Salmon Company from going, and indeed it is difficult to see how the Commission could have reached any other conclusion.

The Alaska Packers Association planned to take fewer men because of a curtailed season. Respondents argue that since fewer men would have been employed in 1940

[20]Res. Br. pp. 25-28, incl.

than in 1939, certain individuals would have been unemployed for this reason, and since it is impossible to tell which individual would have been among those left, all are entitled to compensation.

We submit that if there is one function which must clearly be the Commission's it is the determination of such questions as these—the application of the facts to each individual case and the final determination as to who is and who is not entitled to benefits or subject to disqualification.

Certainly if the performance of this function of the Commission is to be successfully attacked, it is respondents' burden adequately to establish the Commission's error. The record as it now stands neither shows the names of the claimants nor their number. Nor does it show the number of jobs available in 1939 nor the number which would have been available in 1940 if there had been no dispute. The record shows that with respect to the Alaska Salmon Company there were approximately 300 individuals employed in 1939 (R. 15-25), but it does not show how many or if any of these persons filed claims. The record does show, however, that the Alaska Packers Association employed about 1000 individuals in 1939 and planned to employ in 1940 about two-thirds of this number (R. 541). It also shows that the Red Salmon Canning Company planned to take as many, if not more, men for the 1940 operation than in 1939 (R. 567). The record does not show how many of the 1939 employees of the Alaska Packers Association were ready or available to go in 1940, or how many applied for unemployment insurance, nor does it show how many men were employed by the Red

Salmon Canning Company in 1939 or were available to go in 1940.

Notwithstanding that the record is silent on the subject, we have been advised by the Commission that approximately 725 persons applied for compensation, of which approximately 588 were approved for compensation subject to the disqualification, and of this number approximately 486 have received compensation after the expiration of the two weeks' and eight weeks' periods.[21] If we estimate, on the scanty record showing, that there were some 1600 cannery workers employed in Alaska by these employers in 1939, which we believe to have been the case, it is apparent that approximately half of them were available at the commencement of the 1940 season, and therefore whether or not one or more of the employers would have curtailed their operations, there would have been plenty of jobs for all those who applied. It may be assumed that because of the long layoff season a number of the 1939 employees found other jobs, as is generally the case. It would, therefore, appear that the Commission's findings were well justified, but whether these facts and figures are correct or not, the burden, we contend, is respondents' to establish that the Commission erred if such is the case.

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[21] At the taking of the testimony in San Francisco, no one knew who or how many the claimants were and reference to this subject was made on several occasions. When Mr. Oliver, attorney for the Alaska Salmon Company, objected because he didn't "know yet what the Claims are or who the Claimants were," the attorney for the respondents stated that he could get them from the Commission (R. 600). Neither the number of claimants nor their names are contained in the record. We suspect and the record indicates that additional unemployed cannery workers continued to file claims and that the 725 include many who filed claims long after this appeal was perfected.

3. RESPONDENTS' AUTHORITIES.

Respondents' authorities may be classified in the following categories:

The first category includes cases like *Phillips Co. v. Walling*, supra, which support the general proposition that a remedial statute should be liberally construed with respect to coverage and exemptions. These cases will be found on pages 6 to 9, inclusive, of respondents' brief.

The second category includes such cases as *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615; *Associated Press v. Labor Board*, 301 U.S. 103, 81 L.Ed. 953, 57 S.Ct. 650; *Labor Board v. Mackay Co.*, 304 U.S. 333, 82 L.Ed. 1381, 58 S.Ct. 904; *Labor Board v. Sands Mfg. Co.*, 306 U.S. 332, 83 L.Ed. 682, 59 S.Ct. 508; *United States v. Hutcheson*, 312 U.S. 219, 85 L.Ed. 788, 61 S.Ct. 463, and *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, 85 L.Ed. 63, 61 S.Ct. 122.[22] These cases uphold the proposition that the term "labor dispute" should be accorded the fullest scope under the statutes involved in these cases, a proposition with which, of course, we agree.

The third category includes such state court cases as respondents cite to support their argument and which may be listed as follows:

> *Graham v. State Unemployment Comm. of Oregon* (Circ. Ct. Oregon, 4th Jud. Dist.), C.C.H. Unemployment Insurance Service, Oregon, par. 1980.02, former par. 8030, Sept. 2, 1940,

a clear case of discharge by the employer, obviously involving involuntary action on the part of the discharged

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[22]See Res. Br. pp. 12 to 13, incl.

employees. We believe every state act would give such employees benefits.

Bonner v. Unemployment Compensation Board of Review (Superior Ct. Pa.), 156 Pa. Super. 367, 40 Atl. (2d) 106,

where the court reversed the Commission for the sole reason that work was unavailable to the men due to the company's failure to furnish jobs.

United States C. Co. v. Unemployment C. Bd. of Review (Ohio Court of Appeals), 66 Ohio App. 329, 32 N.E.(2d) 763, 135 A.L.R. 927,

where the disqualification obviously did not apply and the language is quite different from the language of the Alaska Act.[23]

Bunny's Waffle Shop v. Cal. Emp. Com., 24 Cal. (2d) 735, 151 P. (2d) 224,

where the court expressly holds that the unemployment was due to affirmative economic action taken by the employers whereby the employees were thrown out of work involuntarily. There the labor dispute had been continuing for some time but the employees continued working. Although no dispute existed as to wages, the employers suddenly reduced wages 25 per cent and imposed other less favorable working conditions as an economic weapon to force the employees of different employers to bargain collectively under a master agreement. The California

[23]In Ohio the act under which respondents' cases were decided has been amended to broaden the scope of the disqualification. In Pennsylvania the regulations under which respondents' cases were decided have been superseded by new regulations which do not limit the scope of the disqualification as did the former regulations.

court held that the employees had left their work because of the unfair economic action of the employer and not because of the trade dispute. The obvious implication under the California decision is that if the men had left their work because of an inability to agree upon the bona fide issues of the dispute, the disqualification would properly have applied.[24]

The fourth category includes numerous rulings of unemployment commissions available only in the reporting services. The brevity of the note describing the case contained in the service, the summation of the agency's finding, and the general looseness of the reporting makes it impossible to evaluate these decisions or to make any authoritative statement about them. Most of the references in respondents' brief as to where these authorities may be found are to the Commerce Clearing House Unemployment Insurance Service, and with respect to several cases an obsolete reference is given because the case has been dropped out of the current service presumably because the editor regarded the case as no longer authoritative.[25] Respondents have drawn heavily on agency decisions with respect to miners out of work in the coal industry, but the reports of these cases indicate that in no single instance are the facts in any way comparable to

[24]These cases will be found on pages 15 to 18, inclusive, and on page 28 of respondents' brief.

[25]Such instances include the *Indiana Unemployment Commission* case, cited on page 22 of respondents' brief, the second *Michigan Unemp. Comp. Comm.* case cited on page 27 of respondents' brief, from both of which cases respondents quote, and the *Pennsylvania Unemployment Commission* case, cited at page 15 of respondents' brief.

the facts involved here. In one case[26] benefits were allowed only from the time the labor dispute was settled until the employer reopened his plant, and benefits were denied while the labor dispute was in progress. In other cases[27] claimants were laid off for economic reasons, while work would normally have been available, prior to the commencement of the labor dispute, and the unemployment was held to be due to the layoff and not to the subsequent labor dispute. In another case[28] unemployment benefits were allowed during the nonoperating season notwithstanding the existence of a labor dispute, because, regardless of the labor dispute, work would not have been available in any event, and this the agency properly held was the cause of the unemployment.[29]

Respondents also cite a type of case[30] where employees are out of work due to a labor dispute between the employer and another union. This problem is not involved here and in many instances is decided, as presumably was

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[26] *West Virginia Appeal Tribunal*, Dec. No. AT-652; Affirmed by Board of Review Dec. No. 155; C.C.H. Unemployment Insurance Service, West Virginia, par. 1980.03, Aug. 30, 1939 (Res. Br. p. 23).

[27] *Indiana Appeal Tribunal*, No. 39-LD-6, 7, 9, 10, 11, C.C.H. Unemployment Insurance Service, Indiana, par. 1980.02, former par. 8066.06, April 10, 1939 (Res. Br. p. 26).

[28] *Michigan Unemp. Comp. Comm.*, Ref. Dec. No. 1589, C.C.H. Unemployment Insurance Service, Michigan, par. 8049.06 (old) (Res. Br. p. 27).

[29] Under the Michigan statute employees in seasonal industries are eligible for benefits at any time without regard to the season (C.C.H. Unemployment Insurance Service, Michigan, par. 2000). Most state acts which have dealt with the matter of seasonal industries restrict seasonal wage credits to unemployment occurring only during the seasonal period (C.C.H. Unemployment Insurance Treatise, par. 2000).

[30] *Indiana Unemployment Commission, Appeal Tribunal*, No. 39-LD-51, C.C.H. Unemployment Insurance Service, Indiana, par. 8076.34 (old) (Res. Br. p. 22).

done in the case cited, by determining whether the employees are prevented by violence from going through the picket line, in which case they are not disqualified, or whether they sympathetically refuse to go through a picket line, in which case benefits are denied on the theory that the employees adopt the dispute as their own.

E. CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

Dated, San Francisco, California,
October 2, 1946.

Respectfully submitted,
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(Appendix Follows.)

Appendix

Excerpts from Senate Finance Committee Report No. 628 to accompany H. R. 7260 (which became the Social Security Act):

"The essential idea in unemployment compensation is the creation of reserves during periods of employment, from which compensation is paid to workmen who lose their positions when employment slackens and who cannot find other work. Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed. * * * Payment of compensation is conditioned upon continued involuntary unemployment. Beneficiaries must accept suitable employment offered them or they lose their right to compensation" (p. 11).

"Against the tax a credit is allowed up to 90 per cent of the tax for contributions to State unemployment compensation funds, which are established under laws which meet the conditions prescribed in section 903. These conditions do not prescribe what sort of unemployment compensation laws the States shall enact; they are intended merely to make certain that the States actually have unemployment compensation laws, rather than mere relief measures" (p. 12).

"Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington" (p. 13).

"Unemployment compensation will not completely eliminate the necessity for unemployment relief. To the extent, however, that unemployment reserves are accumulated, they will reduce the necessity for relief. In normal periods, unemployment compensation will provide a sufficient safeguard for most of the unemployment that will occur, and in depression periods, will very materially reduce the burden of relief costs" (pp. 15-16).

"Should the establishment of unemployment compensation funds be delayed, the reserves which will be available when the next crisis comes will be correspondingly lessened and the burden of relief costs increased" (p. 16).

Excerpts from Report of the Committee on Economic Security submitted to the President of the United States in January, 1935:

"Unemployment compensation, as we use this term, includes both unemployment insurance and unemployment reserves. It is a device through which reserves are accumulated during periods of employment to be paid out in periods of unemployment" (p. 8).

"Benefits from unemployment-insurance funds are payable only for involuntary unemployment which is not due to the employee's own misconduct. An employee who is discharged or laid off is required to register at his nearest employment office, but draws no benefits during a specified waiting period" (p. 9).

"To encourage efficient administration, without which unemployment insurance will fail to accomplish its purpose, we believe that the Federal Government should aid the States by granting them sufficient

money for proper administration, under conditions designed to insure competence and probity" (pp. 15-16).

"*Willingness-to-work test.*—To serve its purposes, unemployment compensation must be paid only to workers involuntarily unemployed. The employees compensated must be both able and willing to work and must be denied benefits if they refuse to accept other suitable employment. Workers, however, should not be required to accept positions with wage, hour, or working conditions below the usual standard for the occupation or the particular region, or outside of the State, or where their rights of self-organization and collective bargaining would be interfered with" (p. 18).